

With a little help from Henry VIII

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There are few legislative assemblies in Europe which can call themselves with proud sovereign. The Principle of Parliamentary Sovereignty is the most important part of UK constitutional law. It implies that all legislation derives from the superior legal authority of Parliament and hence it is the job of the Members of Parliament to create, abolish and change the law. Well, since Henry VIII this principle is no longer entirely true, and it is currently challenged again by the future “Great Repeal Bill”.

This week Brexit is back on the agenda of the two Houses of Parliament in the UK. The Lords (30th and 31st January) and the MPs (31st January) discussed “The European Union (Withdrawal) Bill” (EU Bill) or also known as “The Great Repeal Bill”. The EU Bill which was published on July 2017 is the centre piece of British exit legislation and so to speak the Government’s legal roadmap to provide for a smooth and orderly Brexit. Among other things it aims to repeal the “The European Communities Act” from 1972 which is the domestic legal basis of the UK EU membership and to (re-)transpose the huge amount of EU regulation into British statute books on the exit day. It didn’t come as a surprise that this Bill caused already passionate debates in Parliament and the first defeat of Theresa May in the House of Commons. However, it seems that this time something rather technical and dull causes trouble for the Prime Minister and her Majesty’s Government in Westminster.

Despite the question whether to stay or to leave the EU the EU Bill delegates also a bunch of regulatory powers to the Government. According to the current draft ministers will get the power to pass hundreds of laws without any approval of the British Parliament. Such a transfer or delegation of power from Parliament to Government has a long-standing tradition in the UK and it’s also known as “Henry VIII Clauses”. These powers were created during the Reign of Henry VIII in 1539 and allowed the King to enact his proclamations directly as statutes without the consent of Parliament. In principle these powers still exist under UK constitutional law and they enable the Government to amend primary and secondary legislation by regulations without full parliamentary scrutiny.

The EU Bill will contain exactly these Henry VIII clauses so that the Government can transpose former EU legislation into British law by regulation without a long parliamentary process. Especially Clause 7, 8, 9 and 17 of the EU Bill (get the full picture of all delegated powers under the future EU Bill, see here) put ministers in a position as legislator. Only clause 9 is directly linked to the implementation of the future UK-EU withdrawal agreement while all the other clauses mostly enable ministers to make necessary modifications or amendments in British statute books relating to primary or secondary legislation derived from EU law. Particularly clause 17 of the EU Bill, whereby the ministers of the Crown may make by regulation changes to legislation “as the minister considers appropriate in consequence of this Act”, is very vague. Additionally, only clause 8 and 9 contain sunset clauses while the other Henry VIII clauses are unlimited.

Given that these provisions become law, it seems that UK Government is going to enjoy a

wide range of power to pass law without full parliamentary scrutiny. I'm not sufficiently educated in UK constitutional law to consider whether the EU Bill is an actual serious threat to parliamentary sovereignty or not (you may find answers to this question [here](#)) but the vague wording of the unlimited Henry VIII clauses are at least worrying. When it comes to the delegation of legislation powers any Parliament would be well advised to insist on narrowly defined delegation provisions and to limit the delegation only to what is necessary. Of course, the parliament is free to repeal the delegation of powers at any time or it can even stop specific regulation but the last time it actually did so was 1979. Moreover, having in mind the enormous amount of EU legislation the UK must transpose after the exit day it seems unlikely that the Parliament with its limited resources can fully control and check all the legislation made by minister's regulation.

However, one should also note that Henry VIII clauses are not a unique and old-fashioned feature of British constitutional law. Last year the French Government used [Art. 38](#) of the French Constitution (FC) to realise its controversial reform of labour law. Under Art. 38 FC the French Parliament can also empower the Government to enact primary legislation by "[ordonnance](#)". But the *ordonnance* needs to get ratified by the French Parliament during a certain period, if not, the law is still valid but ranked as secondary legislation. The EU treaties contain provisions quite like the British Henry VIII powers, too. Just recently the EU also experienced that the EU version of Henry VIII powers for usually technical matters like the renewal of [authorisations to use herbicides](#) can be highly political. Under Art. 290 and 291 of Treaty on the Functioning of the European Union (TFEU) the European legislator can empower the commission to enact so-called implementing or delegated acts. The specific EU procedure to pass implementing or delegated acts is also called [comitology](#) and puts the European Parliament in the same miserable position as Henry VIII does with the British Parliament. Given the vast amount of legislation regulated by the comitology procedure the EP due to its limited resources cannot always check the Commission sufficiently in this regard. The idea behind all these types of Henry VIII provisions is a balancing act between efficient and democratic legislation which some argue wasn't always that balanced in the UK and also on EU level (you can [listen here](#) to the former Lord Justice of England and Wales, Lord Judge on Henry VIII clauses on BBC Radio 4).

In the past, actually [80 to 90 percent](#) of the usage of Henry VIII clauses derived from Section 2 (2) of the European Communities Act 1972 which empowers ministers to implement and transpose EU legislation into UK law. One of the core arguments or objectives of Brexiteers during the Brexit campaign was to 'restore full parliamentary sovereignty' and 'take back control'. It was promised that once the UK left the EU one would get rid of undemocratic European regulation and to reduce the amount of Henry VIII clause usage by the Government. The current design of the EU Bill with its numerous Henry VIII clauses does not really appear as the right way to restore parliamentary sovereignty and to end the excessive use of Henry VIII powers in EU regulation matters. It is also not without irony that the UK is leaving the EU because many politicians promised to give back control to the British people while at the same time the British Government provides itself with powers to create the bright future outside the EU without the parliament.

SUGGESTED CITATION Melzer, Alexander: *With a little help from Henry VIII*, *VerfBlog*, 2018/2/02, <https://verfassungsblog.de/with-a-little-help-from-henry-viii/>, DOI: <https://dx.doi.org/10.17176/20180202-082706>.